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9 *Attorneys for Defendants City of Phoenix,*
10 *Patrick Hanlon and Nicholas French*

11 **UNITED STATES DISTRICT COURT**
12 **DISTRICT OF ARIZONA**

13 ERNEST JOSEPH ATENCIO, surviving
14 father of Ernest Marty Atencio, individually
15 and on behalf of the following statutory
16 beneficiaries of Ernest Marty Atencio:
17 Rosemary Atencio, surviving mother of Ernest
18 Marty Atencio; Joshua Atencio, surviving son
19 of Ernest Marty Atencio; Joseph Atencio,
20 surviving son of Ernest Marty Atencio; M.A.,
a minor and surviving son of Ernest Marty
Atencio; and MICHAEL ATENCIO, Personal
Representative of the Estate of Ernest
Marty Atencio; and ROSEMARY ATENCIO,
individually; JOSHUA ATENCIO,
individually; JOSEPH ATENCIO,
individually; and M.A., through his Next
Friend, Eric Atencio,

21 Plaintiffs,

22 v.

23 SHERIFF JOSEPH ARPAIO and AVA
24 ARPAIO, husband and wife; MARICOPA
25 COUNTY, a public entity; JAIME
26 CARRASCO and JANE DOE CARRASCO,
27 husband and wife; ADRIAN DOMINGUEZ
28 and JANE DOE DOMINGUEZ, husband and
wife; CHRISTOPHER FOSTER and JANE
DOE FOSTER, husband and wife;

NO. 2:12-cv-02376-PHX-PGR

**DEFENDANTS CITY OF
PHOENIX, HANLON, AND
FRENCH'S ANSWER TO
PLAINTIFF'S COMPLAINT AND
DEMAND FOR JURY TRIAL**

1 ANTHONY HATTON and JANE DOE
2 HATTON, husband and wife; CRAIG
3 KAISER and JANE DOE KAISER, husband
4 and wife; ANTHONY SCHEFFNER and
5 JANE DOE SCHEFFNER, husband and wife;
6 JOSE VAZQUEZ and JANE DOE
7 VAZQUEZ, husband and wife; JASON
8 WEIERS and JANE DOE WEIERS, husband
9 and wife; IAN CRANMER and JANE DOE
10 CRANMER, husband and wife; WILLIAM
11 MCLEAN and JANE DOE MCLEAN,
12 husband and wife; MONICA SCARPATI and
13 JOHN DOE SCARPATI, wife and husband;
14 CITY OF PHOENIX, a public entity;
15 PATRICK HANLON and JANE DOE
16 HANLON, husband and wife; NICHOLAS
17 FRENCH and JANE DOE FRENCH, husband
18 and wife.

19 Defendants.

20 Defendants City of Phoenix, Hanlon, and French, for their Answer to Plaintiffs'
21 Complaint, denies each and every, all and singular, of the allegations contained in
22 Plaintiffs' Complaint and each claim for relief which is not expressly admitted or
23 otherwise pled to. Defendant admits, denies, and alleges as follows:

24 **JURISDICTION AND VENUE**

25 1. In answering Paragraph 1, Defendants admit that Plaintiffs have made allegations
26 of violation of the Fourth and Fourteenth Amendments as well as have made claims
27 arising under state law. In so admitting, however, Defendants make no admissions
28 relative to the legal sufficiency of such claims.

29 2. In answering Paragraph 2, Defendants admit that the majority of the parties are
30 residents of Maricopa County, Arizona and that the events alleged by Plaintiff occurred in
31 Maricopa County. Defendants, however, affirmatively allege that jurisdiction is proper in
32 the United States District Court, for the District of Arizona, as a result of Plaintiffs'
33 federal law claims.

PARTIES

3. The allegations set forth in Paragraph 3 do not call for a response from these answering Defendants.

4. Defendants admit the allegations set forth in Paragraphs 4, 5, and 6 of Plaintiffs' Complaint.

5. Defendants lack sufficient information to form a belief regarding the allegations set forth in Paragraphs 7, 8, 9, and 10 of Plaintiffs' Complaint and therefore deny the same.

6. The allegations contained in Paragraphs 11, 12, 13, and 14 of Plaintiffs' Complaint are not directed to these answering Defendants and therefore no response is required.

7. In answering Paragraph 15, Defendants admit only that the City of Phoenix is a public municipal corporation formed and designated as such pursuant to the applicable Arizona Revised Statutes. The remaining allegations call for a legal conclusion and therefore no response is required.

8. In answering Paragraph 16, Defendants admit only that Patrick Hanlon and Nicholas French were employees of the City of Phoenix, employed and working as police officers, during the time frames set forth in Plaintiffs' Complaint. The remaining allegations call for a legal conclusion and therefore no response is required.

9. The allegations set forth in Paragraph 17 call for multiple legal conclusions, and/or are not directed to these Answering Defendants and therefore no response is required. To the extent a response is required, Defendants deny the same. Defendants further affirmatively allege that fictitious Defendants are not permissible in federal court.

FACTUAL ALLEGATIONS

10. The allegations set forth in Paragraphs 18, 19, 20, 21 (including subsections (a), (b), c), (d), (e), (f), (g)), 22 (including subsections (a), (b), (c)), 23 (including subsections (a), (b)), 24, 25, 26, and 27 are not directed to these answering Defendants and no response is required.

DECEMBER 15, 2011

11. In answering Paragraph 28, Defendants admit only that Marty Atencio was a pretrial detainee who ultimately passed away. The remaining allegations are not directed to these answering Defendants and therefore no response is required.

12. Defendants admit the allegations set forth in Paragraph 29.

13. In answering Paragraph 30, Defendants admit only that Phoenix Officers observed Marty Atencio to be acting in an unorthodox manner, including using his fingers in a manner that appeared to simulate a firearm. Defendants further admit that that it was concluded that the behavior was bothersome to those who originally called to report Atencio, but not such that Atencio would be arrested at that time and thus he was ushered off the property. Defendants lack sufficient information to form a belief as the truth of the remaining allegations and therefore deny the same.

14. In answering Paragraph 31 of Plaintiffs' Complaint, Defendants admit only that there were not signs that Marty Atencio was a danger to himself or others. Defendants lack sufficient information to form a belief as to the truth of the remaining allegations regarding medication issues and therefore deny the same.

15. In answering Paragraph 32 of Plaintiffs' Complaint, Defendants admit only that Marty Atencio was not acting in an aggressive manner and therefore was ushered off of the 7-11 property.

16. Defendants admit the allegations contained in Paragraph 33 of Plaintiffs' Complaint.

17. Defendants lack sufficient information to form a belief as to the truth of the allegations, as written, in Paragraph 34 of Plaintiffs' Complaint and therefore deny the same.

18. Defendants lack sufficient information to form a belief as to the truth of the allegations, as written, in Paragraph 35 of Plaintiffs' Complaint and therefore deny the same. Defendants affirmatively allege that Phoenix Officers were told that the female felt that Marty Atencio was acting in an aggressive manner towards her.

19. Defendants admit the allegations contained in Paragraph 36.

20. Defendants lack sufficient information to form a belief as to the truth of the allegations set forth in Paragraph 38 of Plaintiffs' Complaint and therefore deny the same.

21. Defendants admit the allegations set forth in Paragraph 39 of Plaintiffs' Complaint.

22. In answering Paragraph 40, Defendants admit only that Officer Hanlon first observed and had contact with Marty Atencio in the area where detainees wait to go through the medical screening process. Defendants deny the allegations related to knowledge of "Marty's mental illness."

COUNT ONE (Defendants Scarpati and McLean- Fourteenth Amendment/42 U.S.C. § 1983)

23. The allegations set forth in Paragraphs 41, 42, 43, 44, 45, 46, and 47 are not directed to these answering Defendants and therefore no response is required. To the extent that any of the allegations might be construed as pertaining to the specific claims against these answering Defendants they deny the same.

COUNT TWO (Defendants Scarpati and McLean- A.R.S. § 12-611)

24. The allegations set forth in Paragraphs 48, 49, and 50 are not directed to these answering Defendants and therefore no response is required. To the extent that any of the allegations might be construed as pertaining to the specific claims against these answering Defendants they deny the same.

COUNT THREE (Defendants Hanlon, French, Carrasco, Dominguez, Foster, Hatton, Kaiser, Scheffner, Vazquez, and Weiers-Fourth and Fourteenth Amendment/42 U.S.C. § 1983)

25. The allegations set forth in Paragraph 51 are not directed to these answering Defendants and therefore no response is required.

26. In answering Paragraph 52, Defendants admit only that Marty Atencio had his mug shot taken. These answering Defendants lack sufficient information to form a belief regarding the truth of the allegations relating to the Detention Officers and therefore deny the same.

1 27. In answering Paragraph 53, Defendants admit only that Officer Hanlon escorted
2 Marty Atencio to an isolation cell, but do not admit the allegations relative to timing.
3 Defendants lack sufficient information to form a belief as to the truth of the remaining
4 allegations and therefore deny the same.

5 28. In answering Paragraph 54, Defendants deny the allegations contained therein.

6 29. In answering Paragraph 55, Defendants cannot admit or deny the allegations as
7 written. Defendants deny that Marty Atencio told Officer Hanlon that he was hurting him,
8 or uttered any language that had the effect of causing Officer Hanlon to believe that there
9 was such an effect on Marty Atencio. Defendants further deny that Officer Hanlon was
10 engaging in any activity designed, or with the effect, of causing harm to Marty Atencio.

11 30. In answering Paragraph 56, Defendants admit only that Marty Atencio's
12 fingerprints were taken and his handcuffs were removed. Defendants cannot admit or
13 deny the remaining allegations as written. Defendants affirmatively allege that during
14 their interactions with Marty Atencio they were attempting to establish a verbal rapport
15 with him.

16 31. Defendants deny the allegations contained in Paragraph 57 of Plaintiffs'
17 Complaint.

18 32. Defendants admit the allegations contained in Paragraph 58 of Plaintiffs'
19 Complaint.

20 33. Defendants admit the allegations contained in Paragraph 59 of Plaintiffs'
21 Complaint.

22 34. Defendants deny the allegations contained in Paragraph 60 as written. Defendants
23 affirmatively allege that during their interactions with Marty Atencio they were
24 attempting to establish a verbal rapport with him and gain compliance through verbal
25 commands.

26 35. Defendants deny the allegations contained in Paragraph 61 of Plaintiffs'
27 Complaint.

1 36. The allegations set forth in Paragraphs 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71,
2 and 72 are not directed to these answering Defendants and therefore no response is
3 required. To the extent that any of the allegations might be construed as pertaining to the
4 specific claims against these answering Defendants they deny the same.

5 37. Defendants deny the allegations contained in Paragraphs 73 and 74 to the extent
6 that they are directed to them. To the extent the allegations are directed at other
7 Defendants no response is required.

8 **COUNT FOUR (Defendants Hanlon, French, Carrasco, Dominguez,**
9 **Foster, Hatton, Kaiser, Scheffner, Vazquez, Weiers, and Maricopa County and the**
10 **City- A.R.S. § 12-611)**

11 38. The allegations set forth in Paragraph 75 are not directed to these answering
12 Defendants and therefore no response is required.

13 39. The allegations set forth in Paragraph 76 call for multiple legal conclusions and
14 therefore no response is required. Defendants deny the use of excessive force.

15 40. Defendants deny the allegations set forth in Paragraph 77 and 78, to the extent they
16 are directed to these answering Defendants.

17 41. The allegations set forth in Paragraph 79, to the extent they are directed to these
18 answering Defendants, call for a legal conclusion and therefore no response is required.

19 42. The allegations set forth in Paragraphs 80, 81, are not directed to these answering
20 Defendants and therefore no response is required.

21 43. Defendants deny the allegations set forth in Paragraph 82, to the extent they are
22 directed to these answering Defendants.

23 **COUNT FIVE (Defendants Hanlon, French, Carrasco, Dominguez,**
24 **Foster, Hatton, Kaiser, Scheffner, Vasquez, and Wiers- Fourteenth Amendment**
25 **Right to Family Society and Companionship)**

26 44. The allegations set forth in Paragraph 83 are not directed to these answering
27 Defendants and therefore no response is required.

28 45. Defendants deny the allegations set forth in Paragraph 84 and 85, to the extent that
they are directed to these answering Defendants.

1 **COUNT SIX (Defendants McLean and Cranmer- Fourteenth**
2 **Amendment)**

3 46. The allegations set forth in Paragraphs 86, 87, 88, and 89 are not directed to these
4 answering Defendants and therefore no response is required.

5 **COUNT SEVEN (Defendants McLean and Cranmer- A.R.S. § 12-611)**

6 47. The allegations set forth in Paragraphs 90, 91, 92, and 93 are not directed to these
7 answering Defendants and therefore no responses is required.

8 **COUNT EIGHT (Defendants Maricopa County and Sheriff Arpaio-**
9 **Deliberate Indifference to Medical Needs/Conditions of Confinement/Fourteenth**
10 **Amendment)**

11 48. The allegations set forth in Paragraphs 94, 95, 96 (including subparts (a) and (b)),
12 97, 98, and 99 are not directed to these answering Defendants and therefore no response
13 is required.

14 **DEMAND FOR JURY TRIAL**

15 49. Defendants—like Plaintiffs—hereby request and demand a trial by Jury.

16 **AFFIRMATIVE DEFENSES**

17 50. Plaintiffs' Complaint, in whole or in part, fails to state a claim upon which relief
18 can be granted.

19 51. Pursuant to A.R.S. § 12-820.04, Plaintiffs may not claim, or recover, punitive
20 damages on any state law claim made against a governmental entity or governmental
21 employee acting within the course and scope of their employment.

22 52. Plaintiffs' punitive damages claim against the Defendants, in their official capacity,
23 is barred by *Smith v. Wade*, 416 U.S. 30 (1983); *City of Newport v. Fact Concerts, Inc.*,
24 453 U.S. 247 (1981); and *Lancaster Community Hospital v. Antelope Valley Hospital*
25 *District*, 940 F.2d 397 (9th Cir. 1991).

26 53. Plaintiffs may have failed to comply with A.R.S. § 12-821.01, the Notice of Claim
27 statute.
28

1 54. Defendants are entitled to all privileges and immunities, including qualified
2 immunity, extended to governmental employees and/or entities under federal law as
3 described in *Hunter v. Bryant*, 112 S.Ct. 534 (1991) and *Saucier v. Katz*, 121 S.Ct. 2151
4 (2001).

5 55. Defendants are entitled to all privileges and immunities afforded to governmental
6 employees and/or entities under state law, including those privileges and immunities
7 provided in A.R.S. § 12-820, *et seq.*

8 56. At all times set forth in the Complaint, Defendants were acting reasonably, in good
9 faith, without malice, and based upon probable cause and/or reasonable suspicion.

10 57. At all times set forth in the Complaint, Defendants' actions were objectively
11 reasonable under the circumstances then existing.

12 58. Defendants allege that Plaintiffs' injuries may have been caused or contributed to
13 by the actions of non-parties at fault pursuant to A.R.S. §12-2506, including, but not
14 limited to, certain of Marty Atencio's mental health and/or medical providers, to the
15 extent that they may have failed to provide appropriate medical and/or mental health
16 treatment before he was arrested.

17 59. Discovery may reveal that Marty Atencio, and/or the Plaintiffs, are solely or
18 comparatively at fault for the injuries and damages alleged in the Complaint, thereby
19 reducing or barring any recovery herein by way of comparative negligence.

20 60. Plaintiffs may have failed to mitigate their damages, thus bring or reducing the
21 recovery against Defendants.

22 61. Plaintiffs' damages were the result of an intervening/superseding cause or occurred
23 as a result of the negligence of someone other than these answering Defendants.

24 62. Marty Atencio, and/or Plaintiffs, may have assumed the risk of injury, and/or may
25 have acted in direct and intentional violation of Arizona laws, and/or may have acted
26 intentionally and knowingly, jeopardizing Marty Atencio's safety.

27 63. To the extent applicable as may be revealed through discovery, Defendants allege
28 the immunities set forth in A.R.S. §§ 12-711, 12-712, and 12-716.

1 64. Defendants' use of force was justified and privileged under Arizona's justification
2 statutes, including A.R.S. Title 13, Section 400 *et seq.*, including but not limited to §§ 13-
3 403, 13-409, 13-410, 13-411, 13-413, and under *Graham v. Connor*, 490 U.S. 386 (1989)
4 and *Scott v. Harris*, 550 U.S. 372 (2007).

5 65. Defendants put Plaintiffs on notice that further affirmative defenses may be added
6 in an amended answer after discovery. These defenses may include any defense set forth
7 in Rule 8(d) and/or Rule 12(b), of the Federal Rules of Civil Procedure, or as otherwise
8 allowed by law.

9 66. WHEREFORE, having fully answered Plaintiffs' Complaint, Defendant requests
10 that Plaintiffs take nothing and that Defendant be awarded his attorney fees pursuant to 42
11 U.S.C. § 1988, A.R.S. §§ 12-349, 12-350, and 13-420.

12 DATED this 4th day of January, 2013.

13 STRUCK WIENEKE & LOVE, P.L.C.

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15
16 By /s/Kathleen L. Wieneke
17 Kathleen L. Wieneke
18 Christina Retts
19 3100 West Ray Road, Suite 300
20 Chandler, Arizona 85226
21 *Attorneys for Defendants City of Phoenix,*
22 *Patrick Hanlon and Nicholas French*

23 **CERTIFICATE OF SERVICE**

24 I hereby certify that on January 4, 2013, I electronically filed the foregoing with the
25 Clerk of the Court for the United States District Court for the District of Arizona by using
26 the CM/ECF system. Participants in the case who are registered CM/ECF users will be
27 served by the CM/ECF system:

28 Michael C. Manning
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